

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KRISTY LYNN SLAFF,) Case No.: ED CV 13-1939-PJW
Plaintiff,)
v.) MEMORANDUM OPINION AND ORDER
CAROLYN W. COLVIN, Acting)
Commissioner of Social)
Security,)
Defendant.)

I. INTRODUCTION

Plaintiff appeals a decision by Defendant Social Security Administration ("the Agency"), denying her application for Disability Insurance Benefits ("DIB"). She claims that the Administrative Law Judge ("ALJ") erred when he: (1) determined that Plaintiff's depression and anxiety did not cause any limitations; (2) relied on the testifying doctor's opinion instead of the treating doctors' opinions; and (3) found that Plaintiff and her husband were not credible. For the reasons explained below, the Court concludes that the ALJ erred and remands the case to the Agency for further proceedings.

1 II. SUMMARY OF PROCEEDINGS

2 In October 2008, Plaintiff applied for DIB, alleging that
3 she had been disabled since August 2006, due to pain caused by
4 fibromyalgia and chronic fatigue syndrome. (Administrative
5 Record ("AR") 70-87, 211-13, 235, 259-66.) The Agency denied
6 the applications initially and on reconsideration. She then
7 requested and was granted a hearing before an ALJ. On March 23,
8 2010, she appeared with counsel and testified at the hearing.
9 (AR 69-88.) The ALJ determined that she was not disabled and
10 denied her application. (AR 94-101.) Plaintiff appealed to the
11 Appeals Council, which remanded the case to the ALJ to address
12 several issues that were overlooked in the first decision. (AR
13 107-10.) On remand, a second ALJ held a hearing and issued
14 another decision, also concluding that Plaintiff was not
15 disabled. (AR 22-34, 41-66.) Plaintiff appealed to the Appeals
16 Council, which denied review. (AR 1-6.) This action followed.

17 III. ANALYSIS

18 A. The ALJ's Finding that Plaintiff's Depressive and Anxiety
19 Disorders did not Cause any Limitations

20 The ALJ determined that Plaintiff suffered from depressive
21 disorder and anxiety disorder and that these were severe
22 impairments. (AR 24.) He also determined, however, that she
23 did not suffer from any mental limitations as a result. (AR
24 27.) Plaintiff contends that this was error. She points out
25 that her treating physician (Pamela Alvarez) opined that her
26 stamina and ability to focus were very limited and the reviewing
27 physician (Loomis) determined that she would be restricted to
28 simple, non-public tasks. (Joint Stip. at 8-9.)

1 The Agency argues that the ALJ did not err in concluding
2 that Plaintiff's mental impairments did not impact her ability
3 to work. It argues that the ALJ sifted through conflicting
4 evidence and arrived at a reasonable decision. It also points
5 out that Plaintiff failed to attend her scheduled consultative
6 examination, which would have provided more information on the
7 extent of her condition and how it may have impacted her ability
8 to work.

9 The Court finds that further information is needed to
10 properly resolve this issue. First, Plaintiff should be
11 examined by the consultative examiner. Once that report is
12 obtained, the ALJ can take it into account along with the other
13 medical evidence, including Dr. Alvarez's and Dr. Loomis's
14 opinions. In doing so, the ALJ should reconsider his decision
15 to reject Dr. Alvarez's opinion on the grounds that: (1) Dr.
16 Alvarez offered an opinion on the ultimate issue of disability;
17 (2) her opinion was inconsistent with the objective medical
18 evidence as a whole; and (3) Dr. Alvarez was a neurologist, not
19 a psychologist. (AR 26.)

20 First, though the issue of disability is reserved to the
21 Agency and, therefore, an ALJ is not bound to accept a doctor's
22 opinion on the subject, see *Boardman v. Astrue*, 286 F. App'x
23 397, 399 (9th Cir. 2008), where, as here, a treating doctor
24 offers such an opinion, the ALJ is not at liberty to reject the
25 doctor's entire opinion based on the fact that she offered an
26 opinion on disability, too. See *Orn v. Astrue*, 495 F.3d 625,
27 631-33 (9th Cir. 2007) (explaining, even if treating doctor's
28 opinion is not entitled to controlling weight, it must still be

1 considered by ALJ). The ALJ may also not reject a doctor's
2 opinion based on a generalized finding that the opinion is not
3 supported by the objective medical evidence. *See, e.g., Embrey*
4 *v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988) (holding ALJ's
5 reasons for rejecting doctor's opinion not clear and convincing
6 where ALJ "merely states that the objective factors point toward
7 an adverse conclusion and makes no effort to relate any of these
8 objective factors to any of the specific medical opinions and
9 findings he rejects"). Instead, he must explain in detail what
10 part of the doctor's opinion is inconsistent with what part of
11 the medical record. Finally, though the Court might agree with
12 the ALJ that psychologist Michael Kania has more expertise in
13 determining limitations caused by anxiety and depression than
14 neurologist Alvarez, it is not clear to the Court that the ALJ
15 would have rejected Dr. Alvarez's opinion solely because she is
16 a neurologist. On remand, the ALJ should reconsider this issue
17 as well.

18 B. The ALJ's Rejection of the Treating Doctors' Opinions

19 Plaintiff complained that she suffers from fibromyalgia.
20 The ALJ agreed, determining that Plaintiff's fibromyalgia was a
21 severe impairment. (AR 25.) At the hearing, the ALJ called
22 medical expert Arthur Lorber to testify about Plaintiff's
23 conditions and her limitations. (AR 55-57.) Dr. Lorber
24 determined that Plaintiff did not have any limitations as a
25 result of her impairments. (AR 56-57.) He also testified,
26 however, that he does not accept fibromyalgia as a valid
27 diagnosis. (AR 57.) The ALJ accorded "great weight" to Dr.

1 Lorber's opinion. (AR 33.) Plaintiff argues that the ALJ erred
2 in doing so. The Court agrees.

3 The Agency and the courts have determined that fibromyalgia
4 is a real disorder that can impact a person's ability to work.
5 See, e.g., *Benecke v. Barnhart*, 379 F.3d 587 (9th Cir. 2004);
6 and Social Security Ruling 12-2, Evaluation of Fibromyalgia,
7 2012 WL 3104869, *2 ("[Fibromyalgia is a [medically determinable
8 impairment] when it is established by appropriate medical
9 evidence. [Fibromyalgia] can be the basis for a finding of
10 disability."). The ALJ in this case determined that Plaintiff
11 has fibromyalgia. It made no sense, then, to call a doctor to
12 testify about Plaintiff's impairments and the limitations caused
13 by them who does not believe that fibromyalgia is real.
14 Naturally, such a doctor would conclude that there are no
15 limitations stemming from a disorder that he does not believe
16 exists. On remand, the ALJ should consult a doctor who believes
17 that fibromyalgia is real and ask that doctor to opine whether
18 Plaintiff's fibromyalgia impacts her ability to work.

19 Plaintiff also contends that the ALJ erred when he accepted
20 Dr. Lorber's opinion over the opinions of the treating doctors.
21 Again, the Court agrees. First, as explained above, the ALJ
22 should not have relied on Dr. Lorber because he does not believe
23 that fibromyalgia exists. Second, the reasons the ALJ provided
24 for discounting the treating doctors' opinions are inadequate.
25 For example, the ALJ rejected the doctors' opinions because they
26 were "inconsistent with the objective medical evidence as a
27 whole." (AR 31-32.) This is not specific enough to withstand
28 scrutiny. *Embrey*, 849 F.2d at 421-22. The ALJ also noted that

1 Plaintiff's ability to participate in daily activities
2 undermined the doctors' opinions that she was extremely
3 restricted. (AR 31-31.) The Court does not agree that
4 Plaintiff's ability to perform minimal activities, like driving
5 her kids one-half mile to school every day, contradicts her
6 doctors' opinions that she is extremely limited. *See Gonzalez*
7 *v. Sullivan*, 914 F.2d 1197, 1201 (9th Cir. 1990) (holding ALJ
8 errs in failing to explain how claimant's ability to perform
9 daily activities translated into an ability to perform work).
10 On remand, the ALJ should reconsider how much weight should be
11 accorded the doctors' opinions.¹

12 C. The ALJ's Credibility Findings

13 The ALJ questioned Plaintiff's testimony that she suffered
14 from disabling pain and limitations because he found that it was
15 inconsistent with her ability to perform various daily
16 activities, like driving, maintaining personal hygiene, and
17 going to family outings. (AR 28.) The Court does not agree
18 that these very limited activities contradict Plaintiff's
19 allegations of severe pain and/or restrictions. *See, e.g.,*
20 *Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001) ("[T]he

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22 ¹ The ALJ rejected Dr. Steinberg's assessment because, among
23 other things, it was performed 11 months after Plaintiff's date
24 last insured. (AR 32.) That, in and of itself, is not a valid
25 reason for discounting a doctor's opinion. *See Lester v.*
26 *Chater*, 81 F.3d 821, 832 (9th Cir. 1995) (noting Ninth Circuit
27 law specifically holds that medical evaluations performed after
28 date last insured are relevant to evaluation of claimant's
condition before date last insured). And, as Plaintiff points
out, the ALJ accepted instead Dr. Lorber's opinion, which came
more than two years after her date last insured. The ALJ cannot
reject one doctor's opinion because it was too late and accept
another doctor's opinion that came even later.

1 mere fact that a plaintiff has carried on certain daily
2 activities, such as grocery shopping, driving a car, or limited
3 walking for exercise, does not in any way detract from her
4 credibility as to her overall disability.").

5 The ALJ also questioned Plaintiff's sincerity because, in
6 response to a question posed by the ALJ, she testified that the
7 last time that she reported side effects to her doctor was four
8 months before the administrative hearing. (AR 59.) It seems
9 that the ALJ misinterpreted this testimony to mean that the
10 first time that she reported the side effects to her doctor was
11 four months before the hearing. (AR 28.) In fact, Plaintiff
12 had been reporting side effects to her doctors for years. (AR
13 649-51, 1016.) Thus, this reason for questioning her testimony
14 is also rejected.

15 The ALJ questioned Plaintiff's credibility as a result of
16 her failure to attend her scheduled consultative examination.
17 (AR 28.) This is backed by the record and is a valid reason for
18 questioning her testimony. See *Carpenter v. Astrue*, 2010 WL
19 841281, at *4 (N.D. Cal. Mar. 10, 2010) (upholding ALJ's finding
20 that claimant was not credible based on fact that she failed to
21 attend consultative examination). Though Plaintiff explained
22 that her failure to attend was due to her need to care for her
23 sick mother, she never made any effort to reschedule the
24 appointment. And her attempt to shift blame to the Agency is
25 unpersuasive. Had Plaintiff truly been motivated to display the
26 extent of her symptoms to the Agency doctor she would have made
27 a point to follow up and arrange for a new appointment after she
28 missed the first one.

1 The ALJ also discussed the fact that Plaintiff's treatment
2 was routine and conservative, though it is not clear if that was
3 one of the reasons he relied on to discount her testimony. (AR
4 29.) This could be a valid reason for questioning Plaintiff's
5 testimony, see *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir.
6 2005), though it is not clear what more aggressive treatment is
7 warranted for fibromyalgia.

8 In the end, the Court finds that only one or two of the
9 three or four reasons relied on by the ALJ for questioning
10 Plaintiff's testimony are valid. Further, it is not clear
11 whether the ALJ would have found Plaintiff not credible based
12 only on the fact that she had failed to attend the consultative
13 examination and had received conservative care. See *Carmickle*
14 *v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008)
15 (holding error by ALJ in credibility determination is harmless
16 "[s]o long as there remains substantial evidence supporting the
17 ALJ's conclusions on . . . credibility and the error does not
18 negate the validity of the ALJ's ultimate credibility
19 conclusion."). For that reason, the Court will remand this
20 issue to the ALJ for further consideration.

21 Finally, Plaintiff complains that the ALJ erred when he
22 rejected her husband's "testimony" that Plaintiff was limited in
23 most everything she did because of her ailments. The ALJ found
24 that this testimony was not persuasive for a variety of reasons,
25 including the fact that it was not supported by the clinical or
26 diagnostic medical evidence the ALJ discussed in his decision.
27 (AR 29.) This reason is germane to the witness and is backed by
28 some of the medical evidence. Because the threshold for

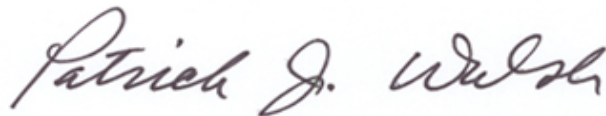
1 rejecting lay testimony is exceedingly low, the Court will
2 affirm the ALJ's finding as to the husband. *See Bayliss v.*
3 *Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005) (approving ALJ's
4 decision to reject lay testimony that was inconsistent with
5 medical evidence).

6 IV. CONCLUSION

7 For these reasons, the ALJ's decision is reversed and the
8 case is remanded to the Agency for further proceedings
9 consistent with this Memorandum Opinion and Order.²

10 IT IS SO ORDERED.

11 DATED: 1/28/15



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14 PATRICK J. WALSH
15 UNITED STATES MAGISTRATE JUDGE
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24 ² Plaintiff requests that the Court remand for an award of
25 benefits. The Court recognizes it has the authority to do so
26 but concludes that there are numerous questions that must be
27 answered before it is clear whether Plaintiff is disabled and
28 entitled to benefits. *See Garrison v. Colvin*, 759 F.3d 995,
1020 (9th Cir. 2014) (noting district court is required to
remand for benefits only when record has been fully developed
and further proceedings would serve no purpose and when ALJ
would be required to find claimant disabled on remand).